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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

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7 BOBBIE ALLEN WOODS,  
8 Plaintiff,  
9 v.  
10 CITY OF HAYWARD, et al.,  
11 Defendants.

Case No. [19-cv-01350-JCS](#)

**ORDER REGARDING MOTION TO  
DISMISS**

Re: Dkt. No. 13

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**I. INTRODUCTION**

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Plaintiff Bobbie Allen Woods, pro se, brought this action against Defendants the City of Hayward, the Hayward Police Department, Hayward Police Officer B. Tong, and Hayward Police Sergeant Polar<sup>1</sup> asserting claims based on a police search of Woods's home. Defendants move to dismiss. The Court found the motion suitable for resolution without oral argument and vacated the noticed hearing date. For the reasons discussed below, the motion is DENIED as to Woods's claim under the Americans with Disabilities Act ("ADA") against the City of Hayward and the Hayward Police Department, GRANTED with prejudice as to Woods's ADA claims against Tong and Polar, and GRANTED with leave to amend as to all other claims. If Woods wishes to pursue the claims dismissed with leave to amend, he may file an amended complaint no later than December 6, 2019.<sup>2</sup>

<sup>1</sup> Although the complaint and the parties' briefs consistently refer to Sgt. "Polar," a consent form filed by defense counsel on behalf of "Polar" lists the name "Ruben Pola" as the client consenting to magistrate judge jurisdiction. *See* dkt. 22. Accordingly, "Polar" may be an erroneous spelling of "Pola." All parties appear to agree that the correct defendants have responded to the complaint, however, and the discrepancy is not relevant to the outcome of the present motion. For consistency with the complaint and briefs, this order uses the name "Polar."

<sup>2</sup> All parties have consented to the jurisdiction of the undersigned magistrate judge for all purposes pursuant to 28 U.S.C. § 636(c).

1           **II. ALLEGATIONS OF THE COMPLAINT**

2           Woods is a seventy-year-old African American man with muscular dystrophy and a  
3           disability as a result of his service in the United States Air Force during the Vietnam War era.  
4           Compl. (dkt. 1) ¶¶ 9, 47.<sup>3</sup> Woods has used wheelchair since his retirement from the United States  
5           Postal Service in 2009. *Id.* Woods rents two rooms of his home in Hayward to Nashi Mixon-  
6           Alexander and her five- and fourteen-year-old sons, all of whom are also African American. *Id.*  
7           ¶¶ 10–11. Mixon-Alexander serves as Woods’s caregiver through a home aide program. *Id.* ¶ 12.  
8           The complaint suggests that her fourteen-year-old son has had some degree of history with the  
9           juvenile justice system, although Woods and Mixon-Alexander “were not complicit with his  
10           activities in any manner.” *See id.* ¶ 26 (alleging that Woods and Mixon-Alexander “were actively  
11           involved with Ms. Mixon-Alexander’s 14-year-old child’s Probation Officers, the Hayward Police  
12           Department, the Juvenile District Attorney Office and Hayward Unified School District officials  
13           to monitor his behavior”).

14           On March 15, 2018, Woods awoke to a voice over a loudspeaker advising that Woods’s  
15           home was surrounded and that all residents must leave the house with their hands raised. *Id.* ¶ 13.  
16           After the command was repeated several times, Woods heard the sound of an explosion. *Id.*  
17           “[E]xtremely frightened,” Woods attempted to leave his bed, but struggled due to his disability  
18           and injured his neck and elbow in the process. *Id.* ¶¶ 14–15.

19           As Woods, Mixon-Alexander, and her older son approached the door of the house, police  
20           officers addressed each of the four residents of the home by name and ordered them to exit the  
21           house with their hands over their heads, despite neighbors shouting to the police officers that the  
22           youngest son was only five years old. *Id.* ¶ 16. Mixon-Alexander and her older son exited first,  
23           while Woods and his neighbors yelled to police that he could not raise his hands because he was  
24           disabled. *Id.* ¶ 17. After the police shined a light on Woods, they allowed him to wheel himself  
25           out of the house without raising his hands, but aimed rifles at his head as he did so. *Id.* Mixon-  
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<sup>3</sup> Because the factual allegations of a complaint are generally taken as true at the pleading stage,  
28           this section recites the allegations of Woods’s complaint as if true. Nothing in this order should be  
                  taken as resolving any issue of fact that might be disputed at a later stage of the case.

1 Alexander's younger son remained sleeping in his bed, and Woods, Mixon-Alexander, and  
2 neighbors pleaded with police to allow them to go get him in order to avoid any risk that he would  
3 be shot by police searching the home, but the police did not allow them to do so. *Id.* ¶ 18.

4 When Woods requested a jacket or blanket, and to be allowed to wait in his home, the  
5 police did not let him return to his home, but after about half an hour, the police provided him with  
6 "a yellow body tarp bag" to use as a blanket. *Id.* ¶¶ 20–21. The body bag, as well as the sound of  
7 the explosion that preceded the search, triggered the post-traumatic stress disorder ("PTSD") that  
8 Woods had developed as a result of his experience in the Vietnam War. *Id.* ¶¶ 21–22.

9 Mixon-Alexander was allowed back into the house to get her younger son and change her  
10 clothes around 6:07 AM, approximately twenty-five minutes after the first loudspeaker  
11 announcements, and Woods was allowed to return to the front room of the house nearly forty  
12 minutes after that, around 6:44 AM. *Id.* ¶ 24. The police officers left the house around 6:58 AM.  
13 *Id.* Police officers denied Woods's repeated requests to speak with the supervising officers until  
14 the search was finished and the officers were preparing to leave, at which point Defendants Tong  
15 and Polar identified themselves as having supervised the operation. *Id.* ¶ 23.

16 The search was conducted pursuant to a warrant that was issued eight days earlier, on  
17 March 7, 2019. *Id.* ¶ 27. Woods contends that there was sufficient time between the issuance of  
18 the warrant and its execution for Defendants to have determined that the occupants of the house  
19 were not a threat and did not require the show of force used in the search. *Id.* Woods also  
20 characterizes the police officers as "disrespectful for not considering [his] disability, [his] age, and  
21 the age of the children, as well as searching female renter Ms. Mixon-Alexander by male officers  
22 while female officers were available on the scene." *Id.* ¶ 25. Woods describes the use of force in  
23 the search as "excessive," and states his "belie[f] that if [he] were a white veteran with the same  
24 profile the warrant would not have been conducted" in the same manner. *Id.* ¶¶ 27–28.

25 Woods's complaint includes the following claims: (1) unreasonable seizure of Woods's  
26 person in violation of the Fourth Amendment and 42 U.S.C. § 1983; (2) unreasonable search in  
27 violation of the Fourth Amendment and 42 U.S.C. § 1983; (3) racial discrimination in violation of  
28 the Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. § 1983; (4) failure to

1 provide a reasonable accommodation in violation of the Americans with Disabilities Act;  
2 (5) negligence; (6) intentional infliction of emotional distress; and (7) invasion of privacy.

3 **III. ANALYSIS**

4 **A. Legal Standard**

5 A complaint may be dismissed for failure to state a claim on which relief can be granted  
6 under Rule 12(b)(6) of the Federal Rules of Civil Procedure. “The purpose of a motion to dismiss  
7 under Rule 12(b)(6) is to test the legal sufficiency of the complaint.” *N. Star Int’l v. Ariz. Corp.*  
8 *Comm’n*, 720 F.2d 578, 581 (9th Cir. 1983). Generally, a claimant’s burden at the pleading stage  
9 is relatively light. Rule 8(a) of the Federal Rules of Civil Procedure states that a “pleading which  
10 sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim showing  
11 that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a).

12 In ruling on a motion to dismiss under Rule 12(b)(6), the court takes “all allegations of  
13 material fact as true and construe[s] them in the light most favorable to the non-moving party.”  
14 *Parks Sch. of Bus. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). Dismissal may be based on a  
15 lack of a cognizable legal theory or on the absence of facts that would support a valid theory.  
16 *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). A pleading must “contain  
17 either direct or inferential allegations respecting all the material elements necessary to sustain  
18 recovery under some viable legal theory.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562 (2007)  
19 (citing *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984)). “A pleading  
20 that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action  
21 will not do.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555).  
22 “[C]ourts ‘are not bound to accept as true a legal conclusion couched as a factual allegation.’”  
23 *Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). “Nor does a  
24 complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Iqbal*,  
25 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). Rather, the claim must be “‘plausible on its  
26 face,’” meaning that the claimant must plead sufficient factual allegations to “allow the court to  
27 draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (quoting  
28 *Twombly*, 550 U.S. at 570).

1 Pro se pleadings are generally liberally construed and held to a less stringent standard. *See*  
2 *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). Even post-*Iqbal*, courts must still liberally construe  
3 pro se filings. *Hebbe v. Pliler*, 627 F.3d 338 (9th Cir. 2010). As the Ninth Circuit explained in  
4 *Hebbe*, “while the standard is higher, our obligation remains, where the petitioner is pro se,  
5 particularly in civil rights cases, to construe the pleadings liberally and to afford the petitioner the  
6 benefit of any doubt.” *Id.* at 342. Nevertheless, the Court may not “supply essential elements of  
7 the claim that were not initially pled.” *Ivey v. Bd. of Regents of the Univ. of Alaska*, 673 F.2d 266,  
8 268 (9th Cir. 1982).

9 If the Court dismisses a complaint under Rule 12(b)(6), it should “grant leave to amend  
10 even if no request to amend the pleading was made, unless it determines that the pleading could  
11 not possibly be cured by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th  
12 Cir. 2000) (en banc) (internal quotation marks and citations omitted). In general, courts “should  
13 freely give leave when justice so requires.” *Id.*

14 **B. Claims Under § 1983**

15 **1. Unreasonable Seizure**

16 A seizure “in the constitutional sense . . . occurs when there is a restraint on liberty to the  
17 degree that a reasonable person would not feel free to leave.” *Doe ex rel. Doe v. Haw. Dep’t of  
18 Educ.*, 334 F.3d 906, 909 (9th Cir. 2003). “Violation of the Fourth Amendment requires an  
19 intentional acquisition of physical control.” *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989).  
20 The Fourth Amendment right to be free of unreasonable seizures requires as a “general rule” that  
21 “seizures are ‘reasonable’ only if based on probable cause to believe that the individual has  
22 committed a crime.” *Bailey v. United States*, 568 U.S. 186, 193 (2013) (citation and internal  
23 quotation marks omitted).

24 Woods’s allegations in this case primarily relate to the manner in which he was required to  
25 leave his home, at which time Defendants *required* Woods to leave a particular location, rather  
26 than preventing him from doing so. There is no allegation indicating that, after he left the home,  
27 Defendants maintained control over Woods such that a reasonable person in his position would  
28 not have felt free to leave. Woods includes factual assertions in his opposition brief that might

1 tend to suggest a seizure—for example, that he was “guarded by two police officers” while the  
2 police completed their search, Opp’n (dkt. 28) at 3—but such assertions in a brief cannot  
3 substitute for allegations in a complaint. This claim is DISMISSED with leave to amend. If  
4 Woods chooses to amend this claim, he should include in his amended complaint all of the  
5 circumstances that led him to believe he was not free to leave.<sup>4</sup>

6 **2. Unreasonable Search**

7 Woods acknowledges in his complaint that the search of his property was conducted  
8 pursuant to a warrant, and includes no allegations suggesting that the warrant was invalid or that  
9 the search exceeded the scope of the warrant. *See* Compl. ¶ 27. Instead, Woods relies on the  
10 Ninth Circuit’s decision in *Franklin v. Foxworth*, 31 F.3d 873 (9th Cir. 1994), which involved a  
11 search of a home where police handcuffed a sick and bedridden man and moved him to a crowded  
12 living room with his genitals exposed for the duration of the search. Although *Franklin* introduces  
13 its analysis with a discussion of the reasonableness of a “search or seizure,” it soon moves on to  
14 the standard for “determining the reasonableness of a seizure,” and focuses on the circumstances  
15 of the plaintiff’s “detention.” *Id.* at 875–78. This Court therefore understands *Franklin* as  
16 addressing an unreasonable seizure, not an unreasonable search. Because, as discussed above—  
17 and in contrast to the handcuffed plaintiff in *Franklin*—Woods has not alleged facts showing that  
18 a reasonable person in his situation would not have felt free to leave, Woods has not stated a claim  
19 for unreasonable seizure, and *Franklin* does not support a claim for unreasonable search.

20 Assuming for the sake of argument that an excessive show of force during a search  
21 pursuant to a valid warrant might in some circumstances establish a constitutionally unreasonable  
22 search without constituting a seizure, Woods has not made such a showing here. An early  
23 morning search by an armed SWAT team could be reasonable under at least some circumstances  
24 where the police have reason to believe that the target of the search poses a serious threat to their  
25 safety. Woods’s complaint includes no information on the purpose of the search warrant, what

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27 <sup>4</sup> Woods’s claim for unreasonable seizure relates only to the purported seizure of his person. *See*  
28 Compl. ¶¶ 31–34 (referring to Defendants having “seized Plaintiff”). The Court has no occasion  
to consider whether the facts alleged, or facts that might be alleged in amended complaint, could  
state a claim for seizure of Woods’s property.

1 sort of suspected criminal activity led to its issuance, or whether Defendants had grounds to  
2 believe that the target of the search (apparently Mixon-Alexander's older son) posed a serious  
3 threat. Absent any allegation to that effect, the complaint does not support an inference that the  
4 means by which the search was carried out were unreasonable. Woods's claim for unreasonable  
5 search is therefore DISMISSED.<sup>5</sup>

6 It is possible that Woods could amend his complaint to state a claim for unreasonable  
7 search despite the existence of a warrant. For example, he might be able to allege facts supporting  
8 a conclusion that the warrant was invalid or that the search exceeded the scope of the warrant.  
9 The Court therefore grants Woods leave to amend this claim.

10 **3. Equal Protection**

11 The Equal Protection Clause of the Fourteenth Amendment provides that “[n]o state shall  
12 . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const.  
13 amend. XIV § 1. This “is essentially a direction that all persons similarly situated should be  
14 treated alike.” *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985); *Clark v.*  
15 *California*, 123 F.3d 1267, 1270 (9th Cir. 1997). Defendants argue that Woods has not alleged  
16 facts plausibly supporting the claim of racial discrimination that he asserts.

17 The case on which Woods relies, *Rodriguez v. California Highway Patrol*, 89 F. Supp. 2d  
18 1131 (N.D. Cal. 2000), predates the Supreme Court's decisions in *Iqbal* and *Twombly*, and does  
19 not apply the more stringent pleading standard that federal courts have used since those decisions.  
20 See *Rodriguez*, 89 F. Supp. 2d at 1135 (reciting the no-longer-valid rule that “[f]or a motion to  
21 dismiss to be granted, it must appear to a certainty that the plaintiff would not be entitled to relief  
22 under any set of facts that could be proved”). That case is no longer good law with respect to the  
23 applicable pleading requirements.

24 In *Iqbal*, the Supreme Court held that “a ‘formulaic recitation of the elements’ of a

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26 <sup>5</sup> Defendants state in headings of their motion and reply brief that this claim fails because Woods  
27 “was not Subject to Search.” Mot. at 3; Reply (dkt. 29) at 2. The intended meaning of that  
28 assertion is not clear. There is no question that Defendants conducted a search of Woods's home, and Defendants do not appear to dispute the uncontroversial proposition that Woods has a cognizable interest in such a search. Nevertheless, because Woods has not plausibly alleged that the search was unreasonable, his claim is dismissed with leave to amend.

1 constitutional discrimination claim” is not sufficient. *Iqbal*, 556 U.S. at 681. Woods’s conclusory  
2 assertion that “[s]imilarly situated White individuals would not have been the subject of the  
3 unreasonable seizure and search” constitutes such a recitation. Compl. ¶ 43. Woods does not  
4 allege, for example, that non-African Americans were *in fact* treated differently in similar  
5 circumstances, or any other facts that might support an inference that Defendants’ conduct was  
6 based on Woods’s and his tenants’ race. Nor does Woods allege more direct indicia of  
7 discrimination, such as any police officer explicitly referring to Woods’s or his tenants’ race.  
8 There is no indication that the comments by police that Woods cites in his opposition—“‘they  
9 sleep around a lot’ and ‘your house is suspected as a safe house’”—had any connection to race.  
10 *See Opp’n at 5.* Woods’s equal protection claim is therefore DISMISSED with leave to amend.

#### 11                   **4.       Claims Against the Hayward Police Department**

12 Defendants argue that the Hayward Police Department cannot be sued under § 1983  
13 because “municipal departments and sub-units are not considered ‘persons’ within the meaning of  
14 Section 1983.” Mot. (dkt. 13) at 6. If correct, such an argument would support dismissal of  
15 Woods’s § 1983 claims against the Hayward Police Department with prejudice.

16 Woods does not address this argument in his opposition brief, but none of the cases that  
17 Defendants cite for that proposition in fact so hold. *See Will v. Michigan Dep’t of State Police*,  
18 491 U.S. 58, 69 (1989) (holding that *states* and “arms of the *State*” are not persons for the purpose  
19 of § 1983 (emphasis added)); *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690–91 & n.54 (1978)  
20 (holding that “local government units” *can* be sued under § 1983 in some circumstances); *Harvey*  
21 *v. Estes*, 65 F.3d 784, 791–92 (9th Cir. 1995) (holding that “an informal association of various  
22 governmental entities setting joint policies and practices for conducting drug investigations and  
23 raids” was not “person” for the purpose of § 1983, without addressing whether the individual  
24 agencies would be subject to suit); *Dean v. Barber*, 951 F.2d 1210, 1214–15 (11th Cir. 1992)  
25 (holding that “[u]nder Alabama law, a county sheriff’s department lacks the capacity to be sued,”  
26 but noting Ninth Circuit precedent that California law is to the contrary); *cf. Mot.* at 6 (citing all of  
27 those cases). Under California law as interpreted by the Ninth Circuit, a “Police Department is a  
28 public entity under [California Government Code] section 811.2” and thus “may be sued in

1 Federal court.” *Shaw v. State of Cal. Dep’t of Alcoholic Beverage Control*, 788 F.2d 600, 605 (9th  
2 Cir. 1986) (reaching that conclusion in the context of a claim under § 1983); *see also Dean*, 951  
3 F.2d at 1214–15 (acknowledging that holding). Although all of Woods’s § 1983 claims, including  
4 claims against the Hayward Police Department, are dismissed with leave to amend for the reasons  
5 discussed above, the Court finds no basis to dismiss claims against the Hayward Police  
6 Department with prejudice.

7 **C. ADA Claim**

8 Woods brings a claim for failure to provide reasonable accommodation of his disability  
9 under the ADA. Woods alleges that he is a qualified individual with a disability on account of his  
10 muscular dystrophy, that “Defendants knew that [he] was disabled, including specifically that he  
11 had muscular dystrophy and that this condition is exacerbated by cold because he told them so  
12 repeatedly,” and that Defendants denied his request to be allowed to sit inside his home during the  
13 search as an accommodation of that disability. Compl. ¶¶ 46–49.

14 Pursuant to Title II of the ADA, “no qualified individual with a disability shall, by reason  
15 of such disability, be excluded from participation in or be denied the benefits of such services,  
16 programs or activities of a public entity, or be subjected to discrimination by any such entity.” 42  
17 U.S.C. § 12132. That provision can encompass “anything a public entity does.” *Lee v. City of Los*  
18 *Angeles*, 250 F.3d 668, 691 (9th Cir. 2001) (citation and internal quotation marks omitted). A  
19 plaintiff’s participation in the state activity at issue need not have been “voluntary” to bring it  
20 within the ambit of the ADA. *See Penn. Dep’t of Corr. v. Yaskey*, 524 U.S. 206, 211 (1998).

21 In order to state a claim under Title II of the ADA, a plaintiff must allege:

22 (1) he is an individual with a disability; (2) he is otherwise qualified  
23 to participate in or receive the benefit of some public entity’s services,  
24 programs, or activities; (3) he was either excluded from participation  
25 in or denied the benefits of the public entity’s services, programs, or  
activities, or was otherwise discriminated against by the public entity;  
and (4) such exclusion, denial of benefits, or discrimination was by  
reason of [his] disability.

26 *O’Guinn v. Lovelock Corr. Ctr.*, 502 F.3d 1056, 1060 (9th Cir. 2007) (citation and internal  
27 quotation marks omitted; alteration in original). Title II may be violated in at least two distinct  
28 ways: (1) by singling out a disabled person for adverse treatment *because of* that person’s

1       disability; or (2) by failing to provide a reasonable accommodation to a person with a disability.  
2       See, e.g., *Waller ex rel. Estate of Hunt v. Danville*, 556 F.3d 171, 174 (4th Cir. 2009). Defendants  
3       devote much of their motion to the former theory, which does not appear in Woods's complaint,  
4       and do not meaningfully address the latter, under which "a public entity [must] 'make reasonable  
5       modifications in policies, practices, or procedures when the modifications are necessary to avoid  
6       discrimination on the basis of disability, unless the public entity can demonstrate that making the  
7       modifications would fundamentally alter the nature of the services, program, or activity.'" *Zukle*  
8       *v. Regents of the Univ. of Cal.*, 166 F.3d 1041, 1046 (9th Cir. 1999) (quoting 28 C.F.R.  
9       § 35.130(b)(7)).

10       Defendants move to dismiss this claim on the basis that the "duty to provide "reasonable  
11       accommodations" under the ADA arises only when a policy discriminates on the basis of  
12       disability," and "[n]o legal authority provides that [Woods's] request constitutes a 'reasonable  
13       accommodation' and that a denial of such request is actionable under the ADA." Mot. at 5  
14       (quoting *Weinreich v. L.A. Metro. Transp. Auth.*, 114 F.3d 976, 978 (9th Cir. 1997)) (emphasis  
15       added by Defendants). While Defendants are correct that the duty to accommodate applies only  
16       where a policy discriminates against the disabled, the Ninth Circuit has held that a plaintiff may  
17       bring a claim under Title II of the ADA "where, although police properly investigate and arrest a  
18       person with a disability for a crime unrelated to that disability, they fail to reasonably  
19       accommodate the person's disability in the course of investigation or arrest, causing the person to  
20       suffer greater injury or indignity in that process than other arrestees." *Sheehan v. City & Cty. of*  
21       *San Francisco*, 743 F.3d 1211, 1232 (9th Cir. 2014), *rev'd in part on other grounds*, 135 S. Ct.  
22       1765 (2015).<sup>6</sup> Accordingly, even a facially neutral policy can "discriminate[] on the basis of  
23       disability," *see Weinreich*, 114 F.3d at 978, if it subjects a person with a disability to "greater  
24       injury or indignity" than someone who is not disabled, *Sheehan*, 743 F.3d at 1232.

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26       <sup>6</sup> In *Sheehan*, the City and County of San Francisco initially sought certiorari on the question of  
27       whether the ADA applies to the conduct of police officers confronted with violence, but after  
28       certiorari was granted, presented no such argument in its briefs to the Supreme Court. *Sheehan*,  
135 S. Ct. at 1772–73. The Supreme Court dismissed certiorari as improvidently granted as to the  
ADA claim, but reversed the Ninth Circuit on unrelated issues pertaining to the plaintiff's separate  
claim under 42 U.S.C. § 1983. *Id.* at 1774, 1778.

1 Woods has alleged that he suffered greater injury and indignity as a result of being forced  
2 to wait outside his home in the predawn chill because his muscular dystrophy was exacerbated by  
3 cold. Defendants have not argued that allowing Woods to wait inside or retrieve a jacket would  
4 “fundamentally alter the nature of the services, program, or activity” at issue in the search, much  
5 less that the Court could so hold at the pleading stage. *Cf. Zukle*, 166 F.3d at 1046. Defendants’  
6 motion to dismiss Woods’s ADA claim against the City of Hayward and the Hayward Police  
7 Department is DENIED.

8 The ADA does not, however, provide a cause of action against individual defendants in  
9 their individual capacities. *See Walsh v. Nevada Dep’t of Human Res.*, 471 F.3d 1033, 1037 (9th  
10 Cir. 2006); *Vinson v. Thomas*, 288 F.3d 1145, 1156 (9th Cir. 2002); *Alsbrook v. City of Maumelle*,  
11 184 F.3d 999, 1005 n.8, 1011–12 (8th Cir. 1999) (en banc) (cited with approval by *Vinson*).  
12 Woods’s ADA claims against Defendants Polar and Tong are DISMISSED with prejudice.

13 **D. State Law Claims**

14 Woods asserts claims under California law for negligence, intentional infliction of  
15 emotional distress, and invasion of privacy. Defendants move to dismiss these claims on the  
16 grounds that: (1) Woods has not alleged sufficient facts to support them under the *Iqbal* pleading  
17 standard; (2) Woods has not alleged compliance with California’s government claims  
18 requirements; and (3) the City of Hayward and the Hayward Police Department can only be used  
19 as provided by statute. *See Mot.* at 6–7.

20 Defendants are correct that Woods must allege compliance with California’s government  
21 claims procedure in order to state a claim under California law against a public entity or its  
22 employees. *See Cal. Gov’t Code §§ 910, 945.4, 950.2; Karim-Panahi v. L.A. Police Dep’t*, 839  
23 F.2d 621, 627 (9th Cir. 1988) (affirming dismissal for failure to allege compliance with  
24 California’s government tort claim procedure). Defendants do not appear to dispute that Woods  
25 filed at least some claim with the City of Hayward. Nevertheless, it is not enough for Woods to  
26 assert compliance in his opposition brief; he must allege compliance in his compliant. *See Karim-*  
27 *Panahi*, 839 F.2d at 627. If Woods decides to pursue these causes of action, he may wish to file  
28 the claim that he submitted to Defendants as an attachment to his amended complaint. If Woods

1 alleges compliance but does not attach the claim to his complaint, and Defendants believe the  
2 claim that he submitted does not encompass all of the claims asserted in this action, they may  
3 request judicial notice of the claim in a subsequent motion to dismiss.

4 Pending a sufficient allegation of compliance with the government claims requirements,  
5 the Court declines to reach Defendants' argument that Woods did not include sufficient factual  
6 allegations to support these claims, although Woods is encouraged to allege all relevant facts of  
7 which is aware in any amended complaint.

8 Defendants are correct that municipal governments may only be sued under California law  
9 as provided by statute. Cal. Gov't Code § 815. Defendants neglect, however, section 815.2 of the  
10 California Government Code, which provides that a public entity may be held liable for the  
11 conduct of its employees within the scope of their duties to the same extent as those employees  
12 can be held liable, and section 820, which provides that public employees may be held liable to the  
13 same extent as private citizens. Taking those statutes into account, the immunity against non-  
14 statutory claims provided by section 815 is unlikely to affect the viability of Woods's claims in  
15 this case.

16 Because Woods has not alleged compliance with California's government claims  
17 requirements, his state law claims are DISMISSED with leave to amend.

18 **IV. CONCLUSION**

19 For the reasons stated above, all of Woods's claims are DISMISSED with leave to amend,  
20 except that his ADA claims against the City of Hayward and the Hayward Police Department may  
21 proceed, and his ADA claims against the individual defendants are DISMISSED with prejudice  
22 and without leave to amend.

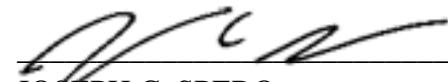
23 If Woods is aware of additional facts that he could allege to cure the defects identified  
24 above, he may file an amended complaint **no later than December 6, 2019**. Any amended  
25 complaint must include the caption and civil case number used in this order (19-cv-01350) and the  
26 words FIRST AMENDED COMPLAINT on the first page. Because an amended complaint  
27 completely replaces the previous complaint, any amended complaint may not incorporate claims  
28 or allegations of Woods's original complaint by reference, but instead must include all of the facts

1 and claims Woods wishes to present and all of the defendants he wishes to sue. *See Ferdik v.*  
2 *Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992).

3 Woods, who is not represented by counsel, is encouraged to consult with the Federal Pro  
4 Bono Project's Legal Help Center in either of the Oakland or San Francisco federal courthouses  
5 for assistance. The San Francisco Legal Help Center office is located in Room 2796 on the 15th  
6 floor at 450 Golden Gate Avenue, San Francisco, CA 94102. The Oakland office is located in  
7 Room 470-S on the 4th floor at 1301 Clay Street, Oakland, CA 94612. Appointments can be  
8 made by calling (415) 782-8982 or signing up in the appointment book located outside either  
9 office, and telephonic appointments are available. Lawyers at the Legal Help Center can provide  
10 basic assistance to parties representing themselves but cannot provide legal representation.

11 **IT IS SO ORDERED.**

12 Dated: November 6, 2019

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14 JOSEPH C. SPERO  
Chief Magistrate Judge

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